SEAH SYE KIM

v.

CHUA MUI YING

COURT OF APPEAL, SINGAPORE
YONG PUNG HOW CJ
CHAN SEK KEONG J
LP THEAN J
[CIVIL APPEAL NO. 14 OF 1988]
5 SEPTEMBER 1991

LAND LAW: *Easement - Driveway - Housing estate - Right of way - Express reservation - Implied reservation - Construction of terms of conveyance - Common intention - Onus on grantor to prove implied reservation - Clear or conclusive evidence - Test of necessary inference - Circumstances prevailing at the time that the land was conveyed - Use of driveway for separate egress and ingress from houses.*

The plaintiff claims an easement of right of way over the defendant's part of a common driveway running on both sides of the boundary between their houses, which were on Trevose Crescent. Both the plaintiff's house (No. 67) and the defendant's house (No. 69) were conveyed to them by the same vendor, HSBC as the vendor and the developers as the original purchasers to the plaintiff as the sub-purchaser. The common driveway has been used by both the plaintiff and the defendant for access to the parking lots at the back of both houses.

The plaintiff contended that the reservation in the terms of the conveyance to him included the defendant's driveway as it was a road built or to be built by the developers in the same estate and providing access to the plaintiff's land and the dwelling house.

The plaintiff's action was dismissed by Grimberg JC. The plaintiff appealed and the question for determination was whether the words of reservation in the No. 69 conveyance to the defendant "to the developers and to all others whom the developers may grant or might have granted the same similar rights of way over ... the said roads" included a right of way over the defendant's driveway, that is, whether there was an express or implied reservation arising from a common intention.

Held:

[1] There is no ambiguity in the reservation of a right of way in the conveyance to the defendant having regard to the terms of the reservation and the circumstances in which the conveyance to the defendant was executed. The persons for whom the benefit of the easement was reserved were the developers and all others to whom the developers may grant such rights. The expression "all persons" would include the defendant since the developers had granted to her a right of way over the said roads. If the expression "the said roads" is construed to include the defendant's driveway, it would result in the developers having purported to grant to the defendant a right of way over her own land. This was not possible in law and accordingly, the "same similar right of way" could not have been over the defendant's driveway, and the expression "the said roads" could not have referred to the defendant's driveway.

[2] The land under development, including all the estate roads, did not belong to the developers. They belonged to the vendor (who was a party to both conveyances), and it made sense for the developers to reserve rights of way over the estate roads which the developers might then be able to grant to future purchasers. The reservation operated against the vendor in respect of the estate roads.

[3] In addition, the said roads were intended to provide access "to the said land and premises hereby conveyed", viz., Private Lot 95B. If "land" has to be distinguished from "premises" in the said expression "land and premises", then the defendant's driveway certainly did not provide access to the land since it was on the land. Accordingly, the said roads would not include the defendant's driveway since it did not provide access to the land.

[4] There must be circumstances that do give rise to a necessary inference that the developer had intended to reserve to themselves a right of way over the defendant's driveway for access to the plaintiff's land, with a reciprocal right of way to the defendant over the developer's land, if they had intended to do so. In this case, there were no such circumstances.

[5] Long and common user of *quasi* easement is an important factor in determining whether a grantor and a grantee have a common intention that they be continued to be enjoyed as before the severance of the grantor's title. In the present case, prior to the severance of the vendor's title the driveway had not even been made up and there was also no common user.

[6] The circumstances existing then could not, realistically, give rise to a necessary inference that the developers and the defendant had the common intention claimed by the plaintiff. They were equally if not more consistent with the owner of No 69 and the future owner of No 67 using his or her own driveway separately for ingress to and egress from their respective houses.

[7] The developers did not reserve a right of way over the defendant's land when they had expressly reserved some other easements. Their failure to do that is, in itself, strong evidence of an absence of any intention to claim such a right of way by way of implied reservation. The developers' omission to claim a right of way on behalf of the plaintiff's predecessor in title when they had the opportunity to do so is again strong evidence that they never thought they had such a right of way as claimed by the plaintiff. The developers could not have intended that the common driveway between No. 67 and 69 should be used by all and sundry the owner of other houses in the estates. It follows from this finding that any common intention between the developers and the defendant would be restricted to and affect only No. 69 and No. 67.

[Appeal dismissed with costs.]

Cases referred to:
Johnstone v. Holdway [1963] 1 QB 601 ***(cit)***
St. Edmundsbury & Ipswich Diocesan Board of Finance v. Clark (No. 2) [1957] 1 WLR 468 ***(cit)***
Re Webb [1951] 2 All ER 131 ***(cit)***
Wheeldon v. Burrows [1879] 12 Ch D 31 ***(cit)***
Aldridge v. Wright [1929] 2 KB 117 ***(cons)***
Barton v. Raine [1980] 114 DLR (3rd) 702 ***(dist)***

Other sources referred to:
Megarry & Wade - The Law of Real Property 5th Ed.

For the appellant - Low Tiang Hock
For the respondent - Ruth Kao

JUDGMENT

Chan Sek Keong J:

This is an appeal by the plaintiff against the decision of Grimberg JC dismissing the plaintiff's claim to an easement of right of way over the defendant's part of a common driveway running on both sides of the boundary between two houses, viz., No. 67 Trevose Crescent, which belongs to the plaintiff and No. 69 Trevose Crescent, which belongs to the defendant.

In this judgment, the expression "the defendant's driveway" will be used to mean that portion of the common driveway situated on the defendant's land, and the expression "the plaintiff's driveway" will be used with the corresponding meaning. The plaintiff's driveway is 2.74 metres wide at the end of Trevose Crescent and 3.95 metres wide about half-way up the driveway, and the defendant's driveway is 2.73 metres wide at the end of Trevose Crescent and 3.5 metres wide at about half-way up the driveway. Since 1957, the common driveway has been used by both the plaintiff and the defendant for access by means of motor cars to the parking lots situated at the back of both the houses.

The said houses and the other houses in the same area were developed in the 1950s by M/s Ideal Homes as part of two housing estates known as Dunearn Park and Whitley Park. No. 69 was conveyed by a conveyance dated 20 June 1956 by Hongkong & Shanghai Bank (Malaya) Trustee Ltd as the vendor and the developers as the original purchasers to the plaintiff as the sub-purchaser. No. 67 was conveyed in the same manner to the plaintiff's predecessor in title by a conveyance dated 24 April 1957. In this judgment, the expression "the No. 69 Conveyance" will be used to refer to the conveyance dated 20 June 1956 and the expression "the No. 67 Conveyance" will be used to refer to the conveyance dated 2 April 1957.

His Honour dismissed the plaintiff's action on three grounds: (1) that the express reservation of easements in the No. 69 Conveyance did not include a right of way over the defendant's driveway; (2) that the plaintiff could not claim a right of way by way of necessity as the plaintiff's driveway provided vehicular access to his parking lot; (3) that there was no common intention between the developers and the defendant that the defendant's driveway be used by the developers and those deriving title from them for access by motor car to and from the parking lot at No. 67.

Before us, Counsel for the plaintiff abandoned the ground of necessity and confined his case to express reservation and implied reservation arising from a common intention.

Was There An Express Reservation of a Right of Way Over Defendant's Driveway?

The terms of the No. 69 Conveyance was as follows:

> ... convey ... All the land and premises described in the First Schedule hereto Together with full and free right and liberty for the [defendant] ... in common with the [developers] and all persons having the like right and liberty with or without horses ... carriages, motor cars and other vehicles of every description at all times and for all purposes whatsoever connected with the use and enjoyment of the said land and premises hereby conveyed to pass and re-pass along over and upon the roads built or to be built by the [developers] in or upon the said Estates and providing access to the said land and premises hereby conveyed ... Reserving nevertheless to the Original Purchasers and to all others to whom the Original Purchasers may grant or have already granted the same similar rights of way along over and upon the said roads and similar rights of drainage and the right to make connections as aforesaid and to construct and use any drains pipes and cable over or under the said land hereby conveyed as

the Original Purchasers may consider necessary for the purpose of serving other adjoining and adjacent houses on the said Estates and to make all necessary connections thereto **TO HOLD** the same unto the Sub-Purchaser in fee simple.

The questions for determination was whether the word of reservation in the No. 69 Conveyance, i.e., "to the [developers] and to all others whom the [developers] may grant or might have granted the same similar rights of way over ... the said roads" included a right of way over the defendant's driveway. This was a question of construction of the said words, in the context of the said conveyance and having regard to the circumstances surrounding its execution.

Counsel for the plaintiff contended before the Judicial Commissioner that the reservation included the defendant's driveway as it was a road built or to be built by the developers in the said estates and providing access to the plaintiff's land and premises. It was argued that the access was not only to the land but also the "premises", i.e., the dwelling house. The Judicial Commissioner rejected this argument. He held: (a) that it was Trevose Crescent that provided the access to the defendant's land and premises and not the defendant's driveway; (b) that there was no need for a right of way to be granted to the defendant over her own property, which was also not possible in law; (c) that there was no express reservation of a right of way over the defendant's land in favour of the developers; and (d) it followed that the developers were in no position to grant a right of way to the plaintiff.

Before us, Counsel for the plaintiff has repeated his arguments he made before the Judicial Commissioner. He also made the following additional points: (1) that the developers, being the owner of the estate roads, did not need to reserve to themselves a right of way over such roads including Trevose Crescent, and accordingly, the expression "said roads" affected by the reservation should be construed to mean the common driveways in the said estates, including the defendant's driveway; (2) any other construction would render the reservation meaningless and superfluous; (3) that the Judicial Commissioner failed to give effect to his own finding of fact that the road which actually provided access to "the premises", as distinct from "the land" was the common driveway; (4) that if there were any ambiguity in the reservation, it should be resolved in favour of the plaintiff.

The reply of Counsel for the defendant to points (1) and (2) was that the reservation of a right of way over the estate roads in favour of the developers was probably for the purpose of preventing the defendant from claiming that she had an exclusive right of way over the said roads. With respect to point (3), she submitted that the plaintiff's driveway was and is capable of providing vehicular access to the plaintiff's house without the need to encroach on the defendant's driveway, and that the Judicial Commissioner had found that the common driveway was in fact two separate driveways running alongside each other.

With respect to point (4), Counsel for the defendant submitted that there was no ambiguity in the reservation, but that if there were, it should be construed in favour of the defendant. It is well established that a reservation of rights to the grantor in a grant operates as a regrant of those rights to the grantee: *Johnstone v . Holdway* [1963] 1 QB 601. The grantor, in effect, becomes the grantee under the reservation. It is also established law that if there is any ambiguity in a grant, it should be construed in favour of the grantee. The question is whether this principle of construction also applies to a grantee in a reservation operating as a re-grant. The law on this point is not finally settled in England. In *Megarry & Wade: The Law of Real Property*, 5th Ed. it is stated (at p. 858) that the Court of Appeal in England has held itself bound (although only *obiter*) in *St.Edmundsbury & Ipswich Diocesan Board*

of Finance v. Clark (No 2) [1975] 1 WLR 468, that a vendor's reservation is to be construed against the purchaser, contrary to the general rule for other reservations and exceptions. We are, or course, not bound by any decision of the English Court of Appeal, much less any *dicta* of that Court.

Having regard to the terms of the reservation, and the circumstances in which the No. 69 Conveyance was executed, we do not find it necessary to decide how the principle of construction should be applied. We are of the view that there is no such ambiguity in the reservation that requires the application of that principle one way or the other.

The circumstances surrounding the purchase of No. 69 and the execution of the No. 69 Conveyance were as follows: the developers had obtained planning permission to develop two housing estates known as Dunearn Estate and Whitley Estate in accordance with approved plans. Access to the sub-divided plots of land was to be by means of the estate roads, one of which was Trevose Crescent, which itself was described as "semi-metalled" on the plans. Access to all the duplex houses fronting one side of Trevose Crescent was provided by common driveways to be constructed between the boundaries of the said houses. Private Lot 95B (on which No. 69 stands) was sold by the developers to the defendant. At the time of the sale, the developers separately agreed to erect a house on the land for the defendant. When the No. 69 Conveyance was executed, the house was still in the course of construction, and thus was not specifically referred to therein. The plan attached to the No. 69 Conveyance showed Private Lot 95B in a row of subdivided plots of land and neither the house nor the driveway was delineated thereon. The No. 67 Conveyance was similar in all such respects.

The easement reserved in the No. 69 Conveyance was "the same similar rights of way over ... the said roads." The persons for whose benefit the said roads were reserved were the developers themselves and "all others" to whom the developers "may grant or have granted" such rights. The expression "all persons" would include the defendant since the developers had granted to her a right of way over "the said roads". If the expression "the said roads" is construed to include the defendant's driveway, it would result in the developers having purported to grant to the defendant a right of way over her own land. As was pointed out by the Judicial Commissioner, this was not possible in law. Accordingly, the "same similar right of way" could not have been over the defendant's driveway, and the expression "the said roads" could not have referred to the defendant's driveway.

However, Counsel for the plaintiff has also put forward the converse argument that "the said roads" could not possibly refer to the estate roads since it was equally impossible for the developers to reserve to themselves a right of way over their own property. We may also add that since the defendant did not own the estate roads, it was also impossible for her to grant a right of way over such roads to the developers and other purchasers. Accordingly, it could be argued that the reservation would make sense only if the "said roads" meant the common driveways. In our view, this argument is founded on the wrong premise. The land under development, including all the estate roads, did not belong to the developers. They belonged to the vendor (who was a party to the No. 69 Conveyance and also to the No. 67 Conveyance), and it made sense for the developers to reserve rights of way over the estate roads which the developers might then be able to grant to future purchasers. The reservation operated against the vendor in respect of the estate roads.

In any case, we find that there are many other contra-indications in favour of the construction put forward by Counsel for the defendant. The first is that the said roads were intended to **provide access** to "the said land and premises hereby conveyed", viz., Private Lot 95B. It

was factually correct to state that in 1956 Trevose Crescent **and** the defendant's driveway provided access to Private Lot 95B. It was also factually correct to state that Trevose Crescent provided access to the land **and** that the defendant's driveway provided access to the house under construction. However, if "land" has to be distinguished from "premises" in the said expression "land and premises", then the defendant's driveway certainly did not provide **access to** the land since it was **on** the land. Accordingly, even on the contention advanced by Counsel for the plaintiff, the said roads would not include the defendant's driveway since it did not provide access to the land.

Moreover, if the contention of Counsel for the plaintiff is right, it would lead to an absurd situation. The reason is that the right of way granted to the defendant was to provide access to No. 69. It was meaningless for the developers to grant the **same** rights of way to any other purchaser over the defendant's driveway, since no other purchaser needed it. The situation was equally absurd in relation to the house itself. If the developers needed a right of way over the defendant's driveway, it would only have been to provide access to No. 67 and not No. 69.

The third contra-indication is that if the developers had reserved to themselves the right to grant such a right of way over the defendant's driveway, then all past and future purchasers would be entitled to drive their motor cars up and down the defendant's driveway, and, it follows, also the plaintiff's driveway. There is no evidence whatever to suggest that the developers could have intended to grant such extended and useless right of way to every owner or resident in the said estates.

In our view, if the developers had intended to reserve a right of way over the defendant's driveway in order to provide access to No 67, it would have been simple for them to have done so expressly and in clear words.

Implied Reservation - Common Intention

Counsel for the plaintiff also submitted that, having regard to the surrounding circumstances, a reservation of a right of way over the defendant's land should be implied in favour of the developers. The law in England as to implied reservations of easement is not in dispute. The principles are set out in the judgment of Jenkins LJ in *Re Webb* [1951] 2 ALL ER 131, at p. 141E. In the context of this case, they may be stated as follows: (1) if the developers intended to reserve any easements over the defendant's land, it was their duty to reserve them expressly: *Wheeldon v. Burrows* (1879) 12 Ch D 31; (2) the developers having failed in this duty, the onus was on them to establish the facts to prove, and to prove clearly, that their case was an exception to the rule: *Aldridge v. Wright* [1929] 2 KB 117. At p. 141 Jenkins LJ also said:

> ...the circumstances of any particular case may be such as to raise a **necessary inference** that the common intention of the parties must have been to reserve some easement to the grantor or such as to preclude the grantee from denying the right consistently with good faith, and ... where circumstances such as these are clearly established the court will imply the appropriate reservation. (Emphasis added).

Evershed MR said, at p. 139, as follows:

> ... it is the duty of a grantor to reserve expressly any right he wishes to maintain against his grantee, or at least, to prove affirmatively that such a reservation was clearly intended by him and his grantee at the time of the grant.

Morris LJ, the third member of the Court, said, at p. 147:

> The implication of a reservation would have to be conclusively indicated and it would not suffice if the matter remained in the sphere of conjecture or ambiguity.

Similarly, in *Aldridge v. Wright* [929] 2 KB 117, Scrutton LJ said, at p. 127:

> the grantee ... when his grantor claims to have impliedly reserved such a right from his grant ... is entitled to require the clearest evidence of an "intention of the parties" that there should be reserved for the benefit of [the grantor's land] an easement or quasi-easement to be used and enjoyed of right.

English law clearly imposes a heavy burden on the grantor to prove an implied reservation of an easement in his favour. The evidence has to be clear or conclusive.

Before the Judicial Commissioner and before us, Counsel for the plaintiff contended that the decision of the Court of Appeal of Ontario in *Barton v. Raine* (1980) 114 DLR (3rd) 702 was on all fours with the instant case. The salient facts of that case are set out in the headnote to the report as follows:

> A purchased parcel No. 1 on which a house was constructed in 1919 and he and his wife occupied it until both died in 1968. In 1941 A bought parcel No. 2, which adjoined parcel No. 1, upon which a house was built in 1924. After A purchased parcel No. 2, he let his son and daughter-in-law occupy it until 1952, when he sold it to them. They subsequently sold it in 1971 to the defendants. Since the late 1920s, a mutual driveway between the two houses had been used by the owners of both parcels to get to and from their garages, except for a few months before A's death. Four feet of the driveway was on parcel No. 1 and eight feet on parcel No. 2. A did not reserve the easement in the 1952 deed. The plaintiff, another son of A, became owner of parcel No. 1 after his parents' death. Some months after the defendants purchased parcel No. 2, a disagreement arose between the plaintiff and the defendants and the defendants then built a fence on the lot line, thereby effectively preventing the plaintiff from reaching his garage by car. In the plaintiff's action for an order directing removal of the fence and a declaration that he had the right to use the driveway, it was held at trial ... (3) that the plaintiff was entitled to use the driveway under the principle of an implied reservation of an easement. On appeal, held, the appeal should be dismissed.

The judgment of the Court was delivered by Thorson JA. The relevant portions of his judgment (at pp. 709-710) are set out below:

> On the facts of the case at bar, I am satisfied that, although the 1952 conveyance made no mention of a right of way over the driveway between the two properties, there was, **by necessary inference** from the circumstances in which the conveyance was made, a common intention on the part of both the father on the one hand and the son and daughter-in-law on the other hand that, after the conveyance, each of them would continue to use the driveway in the same manner as, in fact, it had been used without interruption since the late 1920s. (Emphasis added).

> In 1952 when the property next door was conveyed to them, the son and daughter-in-law of the grantor had been occupying the property for over a decade. The use of the driveway as a common passageway to and from the two garages was an accepted reality of their lives throughout the whole of their occupancy of the property, just as it had been an accepted reality for the owners of the two properties for many years before their occupancy of the property began. ... furthermore, it is not credible that when the son and daughter-in-law purchased the property which they had been occupying for over a decade with the father's permission, there could have been any misunderstanding by them about the basis on which the driveway was to be used thereafter by each of the parties to the conveyance ... it must

be assumed that at the time they purchased the property next door, the son and daughter-in-law knew or were made aware of the location of the property line dividing the two properties, yet it is apparent from the known facts that at no time did they see it to be or treat it as being a consequence of their purchase of the property next door, any more than did the father that thereafter the father would be obliged to have their permission to use the driveway in order to get to and from his own garage. In my opinion, **the only reasonable inference** to be drawn from all of the facts and circumstances surrounding the 1952 conveyance is that each of the parties had a common intention that the father would continue to have the right to use the driveway after the 1952 conveyance as he had before. (Emphasis added)

Quite possibly if, in 1952, the property next door had been purchased by some hypothetical third party who was a stranger to the father, the inference as to the intention of the parties would have been considerably less compelling, inasmuch as the property was then being severed from other property owned by the father, but in this case it is not necessary to indulge in speculation of this kind.

In *Barton's* case, Counsel for the appellant had also raised an argument on the standard of proof. The point was whether "affirmative evidence" (the expression used by Evershed MR in *Re Webb*) was necessary to discharge the burden of proof. Thorson JA said (at p. 711) as follows:

With regard to the absence in this case of the kind of affirmative evidence argued on the basis of *Re Webb* to be needed, it seems to me that in the very nature of the cases such as this, where the conveyance itself is silent on the question of the right sought to be established, the passage of time that not infrequently occurs between the making of the conveyance and the event giving rise to the dispute about the right necessarily militates against the likelihood of any such "affirmative evidence" being available, at least in the form of oral testimony by persons who might be expected to have some personal knowledge or recollection of the intention of the original parties. In my view, the existence of this kind of evidence ought not to be an absolute requirement when it is open to the Court, on a reconstruction of the surrounding facts and circumstances involving a particular grant, to conclude that a reservation from the grant has been established by necessary inference from those facts and circumstance.

Grimberg JC accepted the above-quoted statement of Thorson JA, but nevertheless found that the plaintiff had failed to discharge the burden of proving that there was a common intention to support an implied reservation. He also found that there was no evidence that the defendant's driveway had been used by the developers (a) before the date of the No. 69 Conveyance, and (b) up to the date of the No. 67 Conveyance, for access to and from No. 67. He also observed that there was in *Barton's* case a family relationship which was absent in this case.

His Honour further found that there was positive evidence to negative any common intention. The first bit of evidence was a letter written by the developers to the defendant. The letter was dated 6 March 1957, less than a month before the date of the No. 67 Conveyance. It was written to her on the same day she inquired about the position of the culvert on her driveway which had given her the impression that the boundary had not been correctly sited. The Judicial Commissioner found that she had telephoned the developers because she intended to have a fence erected along the boundary between the two properties. Part of the paragraphs in the said letter read:

We understand that you are contemplating fencing along the line which you believe to be your boundary, and we should like to warn you that if you interfere or trespass on your neighbour's property, you may lay yourself open to a substantial claim.

Grimberg JC was of the view that "if it had been the developers' intention that the space [between the boundary] was to form a common driveway, they would have warned the defendant against erecting a fence at all, and not merely enjoined her to take care that it was erected along the boundary shown on the plans". The only argument that Counsel for the plaintiff was able to advance to this Court on this finding was that the letter was not sufficiently clear.

The second bit of positive evidence was the notation "dual driveways" on the approved building plans. Those words conveyed to his Honour that the sense that the developers had intended the driveways to be separate, but adjacent. The actual words used were "dual driveway", and Counsel for the plaintiff has contended before us that the expression connoted a single driveway.

Before us, Counsel for the plaintiff has again placed emphasis on what he regarded as the common features between *Barton's* case and the instant case, that is,: (1) common ownership of the land prior to alienation; (2) the two properties shared a common driveway; (3) the driveway was not equally distributed; (4) prior to alienation, the whole of the driveway was available for the common owner's use; (5) one of the two properties was then sold first; (6) there was no other form of ingress to and egress from the two houses, and the driveway continued to be used (for almost 18 years) jointly by the owners of both properties in the same manner that it was used before the sale. Additionally, the defendant had notice of the building plans before the house was completed and had agreed to the layout of the said plans.

Counsel submitted that this Court should not require the plaintiff to prove common intention by affirmative evidence and that the circumstances highlighted by him were sufficient to enable this Court to make the necessary inference in favour of the developers, and thus the plaintiff, as regards his right of way over the defendant's driveway.

With respect to the standard of proof, we do not think that the law of Ontario is any different from English law. In *Re Webb* [1951] 2 All ER 131, Evershed MR used the expression "affirmative evidence" to refer to the nature of the evidence required to prove common intention, but the other two members of the Court did not impose such a requirement. We accept the test of necessary inference as stated by Jenkins LJ. In fact, in *Barton's* case, Thorson JA accepted (at p. 709) Jenkin LJ's test of necessary inference from the circumstances and at p. 710, he also used the expression "the only reasonable inference".

The surrounding circumstances must, of course, be those prevailing at the time when the land was conveyed. If there was no common intention then, it could not have arisen thereafter. On this basis, there are, in our view, crucial differences between the material facts in Barton's case those in the instant case. To begin with, in that case, the common driveway had been used for access to the two houses without interruption since the 1920s by A (occupying the house on parcel No. 1) and his son/daughter-in-law (occupying the house on parcel No. 2). Accordingly, when in 1952 the father sold parcel No. 2 to the son/daughter-in-law without an express reservation to use the driveway on parcel No. 2 to reach the garage on parcel No. 1, it was not difficult for the Court to find that the parties had intended that the said driveway be continued to be used as it had been used for the past 20 years and more, **and especially** when the width of the driveway on parcel No. 1 was only 4 feet and therefore too narrow for a motor car to gain access to the garage on the said land. In reality, in so far as the right of way claimed was for access by motor vehicles to the garage at the back of the house, it was a way of necessity. The other important factor in *Barton's* case was the relationship of the parties. The Court found it not credible that after the sale of parcel

No. 2 it was within the contemplation of both the father and the son/daughter-in-law that each would have found it necessary to seek the other party's permission to continue to use the common driveway in the way it had been used for more than 20 years. Thorson JA expressly conceded that if the purchaser had been a stranger, the inference as to the intention of the parties would have been considerably less compelling.

In this case, unlike in *Barton's* case, all the considerably less compelling factors are present. At the date of the No. 69 Conveyance, the defendant's driveway was unpaved, probably an earth road. It was probably used for access to the house for the purpose of construction, and not for use for domestic or residential purposes as contemplated by the right of way that is being claimed by the plaintiff. Although the defendant admitted that her husband had driven up "the driveway", it was not so clear that he meant the common driveway rather than the defendant's driveway. It should be remembered that the approved plans had provided for a 10' driveway up the defendant's land and a driveway of such width was sufficient for ingress to and egress from the house by motor car. Furthermore, such use of the defendant's driveway then could only have been for the purpose of construction of the house. Until the house was completed and occupied, the question of the use of the driveway by the defendant for private purposes could not have arisen.

In our view, these circumstances do not give rise to a necessary inference that the developers had intended to reserve to themselves a right of way over the defendant's driveway for access to No. 67, with a reciprocal right of way to the defendant over the developers' land. The layout of the approved plans together with the use of the ambiguous expression "Dual Driveway" therein are insufficient to give rise to a necessary inference of such intention. Whether the developers had contemplated that the respective future owners, as a matter of convenience, would continue to use the driveways as a common driveway is one thing. Whether they had intended that the future owners should be burdened for all time with such reciprocal obligations is a very different thing.

Even if the developers had such an intention, the circumstances also do not give rise to a necessary inference that the defendant had such a reciprocal intention. At that time, she was not even using the developer's land for access to her house as it had not been built. If any person had used the developer's land for access to No. 69, assuming that it was necessary or reasonable to have done so, it was the developers themselves as they were building the defendant's house. All that she had done up to the date of the No 69 Conveyance was to have agreed to have her house constructed in accordance with approved plans providing for common driveways (to be of 10 feet wide on each side of the boundary) for all similar houses. The defendant on looking at the plans would only have seen a driveway delineated on each side of the boundary of 10 feet wide, each of which was sufficient to allow vehicular access to each house separately. If the width of each road had been narrower, a different inference might be necessary.

In our view, the circumstances existing then could not, realistically, give rise to a necessary inference that the developers and the defendant had the common intention claimed by the plaintiff. They were equally if not more consistent with the owner of No. 69 and the future owner of No. 67 using his or her own driveway separately for ingress to and egress from their respective houses.

In *Re Webb*, or *Aldridge v. Wright*, the easements claimed by way of implied reservation were also in respect of advantages and facilities which the parties had used for some time. Here, the developers were developing two new housing estates for sale to the public. No

easement of any kind then existed as the land was in common ownership. Except perhaps for Trevose Crescent, a semi-metalled road, the common driveways were also not in existence. The developers must have been aware that in sub-dividing the land and developing the estates, misunderstandings might arise as to the rights of way and other easements among the purchasers, unless such rights are clearly provided for in the conveyance. The developers did not reserve a right of way over the defendant's land when they had expressly reserved some other easements. In our view, their failure to do that is, in itself, strong evidence of an absence of any intention to claim such a right of way by way of implied reservation.

In *Aldridge v Wright,* Scrutton LJ dealt with the question of implied reservation of easements as follows:

> (at p. 124) Another [exception to the rule in *Wheeldon v. Burrows*] is where there is at the time of the severance a **formed road or formed drain or watercourse** used before the severance as of right by the tenant under the grantor of the alleged dominant tenement, in which case, as I understand, it is suggested that the grantor could not grant one set of premises so as to destroy the right of the tenant of another set of premises in respect of the premises he occupies, over the premises so granted. There must be an implied reservation of an existing right ... (Emphasis added)

> (at p. 127) The question in this case is not what was granted to No. 28 as of right by the lease, but what was reserved to No. 28 as a right over No. 30 either when separate leases were granted to HJ Hawkins without any mention of such right ... In order to discover the common intention of the parties there must be considered **the terms of the grants, the plans (if any) of the tenements in question, and the user (if any) of the right claimed.** Now questions of fact in an appeal from the County Court are for the county Court judge. (Emphasis added)

Long and common user of *quasi* easement is an important factor in determining whether a grantor and a grantee have a common intention that they be continued to be enjoyed as before after the severance of the grantor's title. In the present case, prior to the severance of the vendor's title the driveway had not even been made up and there was also no common user, as found by the Judicial Commissioner. The plan annexed to the No. 69 Conveyance did not delineate the defendant's driveway and the No. 67 Conveyance contained no express grant of such driveway.

We also agree with the finding of the Judicial Commissioner that the absence of any intention on the part of the developers to reserve a right of way over the defendant's driveway was also evidenced by the developer's letter dated 6 March 1957 (just short of a year after the No. 69 Conveyance) to the defendant in reply to the defendant's query about the siting of the boundary between her house and No. 67 (which was conveyed to the plaintiff's predecessor in title on 24 April 1957). The developer's omission to claim a right of way on behalf of the plaintiff's predecessor in title when they had the opportunity to do so is again strong evidence that they never thought they had such a right of way as claimed by the plaintiff.

We have earlier found that the developers could not have intended that the common driveway between Nos. 67 and 69 should be used by all and sundry the owners of other houses in the estates. It follows from this finding that any common intention between the developers and the defendant would be restricted to and affect only No. 69 and No. 67. This in turn would mean that in respect of other duplex houses in the estates which shared common driveways, any common intention between the developers and those purchasers as regards the use of those driveways would also be similarly restricted. There would need to be a

series of common intentions to be formed on the occasion of each sale of a duplex house. In our view, far from such an inference being necessary, it would be most unrealistic, having regard to the circumstances surrounding the development of the two estates. If the developers had really thought about the matter, they would have expressly reserved such rights of way.

For the above reasons, we are of the view that the decision of Grimberg JC was correct. The appeal is dismissed with costs.

Also found at [1991] 3 CLJ 2721